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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOHN R. FUCHS, Plaintiff and Appellant, v. MARK LEVINE et al., Defendants and Respondents.	B220010 (Los Angeles County Super. Ct. No. SC101999)

APPEAL from an order of the Superior Court of Los Angeles County, Joseph S. Biderman, Judge. Affirmed.

Fuchs & Associates, Inc., John R. Fuchs and Gail S. Gilfillan for Plaintiff and Appellant.

Lurie, Zepeda, Schmalz & Hogan, Kurt L. Schmalz, Steven L. Hogan and M. Damien Holcomb for Defendants and Respondents.

The Law Offices of Mark S. Levine and Mark S. Levine, in pro. per., for Defendant and Respondent.

When Mary Ann Smith and Michael Graham learned that false statements had been made in a private placement memorandum (PPM) on which they had relied in making the decision to invest in Titan Sparkplug Company, Inc., they brought a fraud action against Titan and its directors. After obtaining the defaults of Titan and two of its directors, and settling with a third, Smith and Graham dismissed their action on the eve of trial against the sole remaining defendant, Attorney John Fuchs.[1] Attorney Fuchs then brought the instant malicious prosecution against Smith, Graham, and their counsel in the underlying fraud action, Attorney Mark Levine. Smith, Graham and Attorney Levine prevailed on anti-SLAPP (Code Civ. Proc., § 425.16) motions, on the basis that Attorney Fuchs failed to establish a prima facie case of malicious prosecution, specifically with respect to the element of lack of probable cause. On appeal, Attorney Fuchs argues that he established a lack of probable cause. Alternatively, he argues that the trial court erred in refusing to lift the discovery stay and enable him to conduct discovery on the issue of probable cause. We reject Attorney Fuchs's contentions and affirm.

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[1] Although Fuchs is an attorney, he was sued in his capacity as a director of Titan, not for any legal services he rendered to the corporation.

FACTUAL[2] AND PROCEDURAL BACKGROUND

1. *Smith and Graham Invest in Titan*

On April 1, 2004, Titan issued its PPM, seeking to raise $3,000,000 by selling 100 "[u]nits" of 30,000 shares of stock each to investors at $30,000 per unit. The PPM

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[2] An appellant's opening brief is to include "a summary of the significant facts limited to matters in the record." (Cal. Rules of Court, rule 8.204(a)(2)(C).) Additionally, any reference to a matter in the record is to be supported "by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).) Many of the background facts in the "Statement of Facts Relevant to This Appeal" in Attorney Fuchs's brief are supported by citations to Attorney Fuchs's complaint alleging these facts, rather than evidence supporting the allegations. Moreover, many of the purported facts in this section of Attorney Fuchs's brief are not facts, but instead inferences Attorney Fuchs attempted to draw from the facts. For example, rather than simply stating that Smith, Graham and Attorney Levine dismissed the underlying fraud action against him five days before trial, Attorney Fuchs instead states that, at that time, "Smith, Graham and [Attorney] Levine conceded that they had no evidence to support their claims, and suddenly dismissed the remaining . . . claims against [Attorney] Fuchs." (Emphasis omitted.) There is no citation to the record to support the claim that any such concession was made; instead, Attorney Fuchs cites only to his complaint alleging a concession. In connection with the anti-SLAPP motion, Attorney Fuchs submitted a declaration in which he stated, "the assertion that Smith, Graham and [Attorney] Levine dismissed the remaining . . . claims on the eve of trial, because it would not have been 'worthwhile' to go to trial against me, is in fact a concession that they and [Attorney] Levine knew they would not prevail against me at trial, because they had no evidence to support their claims . . . ." (Emphasis in original.) Smith, Graham and Attorney Levine objected to this language in Attorney Fuchs's declaration, as lacking personal knowledge, lacking foundation, argumentative, irrelevant, and an improper opinion based on speculation and conjecture. The objection was sustained. Attorney Fuchs does not challenge the trial court's ruling on this objection, or, indeed, any of the myriad other objections to his evidentiary showing which were sustained. It is not this court's task on appeal to comb the record in a quest for evidentiary support for the facts asserted in an appellant's opening brief, nor is it this court's task to compare Attorney Fuchs's trial court submissions to the objections thereto and the rulings obtained, in order to determine which, if any, of Attorney Fuchs's purported facts were actually supported by *admissible* evidence. Nonetheless, this court has cross-referenced the objections and rulings with respect to certain key evidence on which Attorney Fuchs relies on this appeal. It is not helpful to Attorney Fuchs's position that his apparent response to an adverse ruling on his evidence is to simply pretend it never happened.

stated that Titan "was organized for the purposes of developing, manufacturing[,] and providing innovative sparkplugs (known as 'the Titan Sparkplug') intended to increase performance, reduce emissions, and improve the quality of life for its users and the environment." The PPM represented that the Titan Sparkplug was invented by Robert Morin, who had obtained a provisional patent for the technology. Morin and his wife, Susan,[3] were directors and officers in Titan, and held a controlling interest in the company.[4] Attorney Fuchs was another director of Titan, and held less than 2 percent of its stock.

As relevant to this case, the PPM also stated, "The Company is not currently involved in any litigation or administrative proceeding believed to be material to the development of the Company's business objectives or the Offering." Prior to preparing the PPM, Titan's counsel asked its directors and officers to respond to a questionnaire. One of the questions asked the respondents to identify "[a]ll legal proceedings or government investigations pending or contemplated to which the Company is or would be a party (or to which its property may be subject)[.]" None of the respondents identified any pending litigation. In particular, Attorney Fuchs responded, "None," even though he was, *at that time*, representing the Morins in litigation over the rights to

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[3] References to "Morin" alone refer to Robert Morin.

[4] Even if the offering were completely successful, the Morins would together hold over 75 percent of Titan's stock.

Morin's spark plug invention (the Morin litigation).[5] Attorney Fuchs would ultimately argue that he was not required to disclose the Morin litigation because Titan was not a party to it, and the spark plug at issue in the Morin litigation was different from the Titan spark plug.[6]

Relying, in part, on the representations in the PPM, Smith and Graham invested in Titan. Graham invested $90,000 for three units; one of the units was a gift to Smith.

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[5] The statement regarding no current litigation was not the only misrepresentation of fact in the PPM. The PPM also stated, "The design and provisional patent for the Titan Sparkplug are held by SEM Technologies, LLC ('SEM'), a Nevada limited liability corporation owned 100% by Robert and Susan Morin. The Company has an exclusive license agreement with SEM to commercially exploit the Titan Sparkplug in all respects. The license agreement provides that the Company will pay SEM a license fee equal to one (1%) percent of gross sales derived from the Company's exploitation of the Titan Sparkplug." It appears that such statements were false. Although Morin testified at a deposition on August 8, 2005, that he had assigned the patent application to SEM and SEM licensed it, in turn, to Titan, Morin subsequently conceded (in a 2008 deposition) that: (1) there was no SEM; (2) a decision had been made in February 2005 not to proceed with SEM; (3) a decision was made to not correct the PPM, as the PPM would expire shortly thereafter; and (4) Morin continued to hold the provisional patent and never assigned to it any other entity, including Titan.

[6] The fact that Titan was not a party to the Morin litigation perhaps explains why Attorney Fuchs wrote "None" on the questionnaire when asked to describe "any interest, affiliation or Connection [he] ha[s] with the Company's legal counsel or Auditor; or any other law firm or accounting firm that has been retained by the Company during the last three fiscal years or is proposed to be retained by the Company." However, Attorney Fuchs had a 2001 retainer agreement with Morin, which described as one of the matters on which he was retained as: "Providing legal advice and assistance in the efforts by Client to regain full patent rights to the Confidential Device and to develop, promote, capitalize upon, find investors for and create a means for perfecting, manufacturing, marketing, distributing and selling the Confidential Device in the public and/or to entities who may then sell to the public." Indeed, Attorney Fuch billed *Titan* for legal work performed as early as April 2, 2004 (*one day* after the PPM issued).

2. *The Undisclosed Morin Litigation*

At this point, a brief overview of the Morin litigation is useful. In 1999, Morin applied for a patent on the spark plug he had developed.[7] In order to exploit his invention, Morin formed a company called Pyromor with other individuals, including Bert Rosenthal. Pyromor failed, and ultimately went into bankruptcy. In November 2000, the bankruptcy court granted the trustee's motion to sell all of Pyromor's rights "in and to the [i]nvention" to an alter ego entity of Rosenthal.[8]

On March 25, 2002, the Morins, represented in part by Attorney Fuchs, filed their complaint in the Morin action, against Rosenthal and others. The ninth cause of action in the complaint was for conversion. The complaint alleged that Rosenthal committed "bankruptcy fraud" by obtaining the order transferring Pyromor's rights to the invention to him. The complaint further alleged, "Thus, to date Morin has been completely and fraudulently deprived of any and all benefits of his Invention, in direct breach and contravention of the terms, promises and representations made by Rosenthal [in certain documents]." In the conversion cause of action, the Morins alleged that Rosenthal (and others) "have stolen and converted the Morins' rights in and to the Spark Plug Invention, and have wrongfully exercised dominion and control over such rights

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[7] There is discussion in the record of the "1999 patent," although it is not entirely clear whether a patent issued at that time.

[8] Subsequently, Rosenthal obtained an additional patent on a similar spark plug. Indeed, on October 6, 2005, Morin's patent counsel wrote Rosenthal, claiming that Rosenthal's patent was entirely based on Morin's invention, and should be transferred to him immediately.

and over the Spark Plug, for their own personal benefit and to the wrongful exclusion of the Morins." The complaint was signed by Attorney Fuchs and verified by Morin.

As to whether the invention at issue in the Morin litigation was the same, or substantially similar to, the invention claimed by Titan, certain deposition testimony in the Morin litigation suggests that it was.[9] At his April 1, 2005 deposition, Morin testified that the intent of Titan was to exploit the invention which was the subject matter of the Morin action. When asked if there was a difference between the spark plug at issue in the Morin litigation and the product Titan intended to sell, Morin replied, "I have to answer that yes and no." Morin took the position that the Titan spark plug was a better version of the Morin litigation spark plug, which he described as a "different generation of product." At this point, Attorney Fuchs volunteered that the key issue (for damages) in the Morin litigation was whether the two spark plugs were "essentially the same product," which Attorney Fuchs argued they were. Attorney Fuchs stated, "[O]ur position here is the idea was a revolutionary spark plug that's completely different than what's on the market. Whether it's subsequently been refined to make it more marketable is simply an argument of degree, not an argument of substance." Morin then testified that he started to invent the Titan plug back in 1998, and that, if he had been given the necessary support at Pyromor, he would have developed the Titan spark plug there.

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[9] Not surprisingly, Morin and Attorney Fuchs take a different position in the instant litigation.

3. *Smith and Graham Learn of the Morin Litigation*

In August 2005, Smith received an email from Eric Malm, a former Titan employee. Malm had written an email to all Titan investors, in which he stated that the intellectual property claimed by Titan was actually owned by a different company, by means of a patent held by Rosenthal. Malm told Smith and Graham of the Morin litigation. Smith then contacted Rosenthal, who confirmed the allegations made by Malm. Rosenthal told Smith that he had obtained the patent through bankruptcy court, and that the Morin litigation involved technology that was similar, if not identical, to the technology claimed by Titan.

Smith and Graham then contacted Morin, who admitted that he was involved in litigation with Rosenthal, but assured them that the Morin litigation did not involve the Titan spark plug. Morin told them to speak with Attorney Fuchs, who similarly told them that the Titan technology was not at issue in the Morin litigation. Attorney Fuchs promised to send Smith copies of Morin's patent documents, which he failed to send. Morin promised to refund Smith's investment, which he failed to do.

4. *Smith and Graham File the Underlying Fraud Action*

On January 20, 2006, Smith and Graham, represented by Attorney Levine, filed their complaint against Titan, the Morins, Attorney Fuchs, and others. The gravamen of the complaint was that, in marketing Titan securities, the defendants failed to disclose, and made false representations with respect to, the fact that Titan's ability to exploit the Titan technology was unresolved due to the then-pending litigation with Rosenthal. As against Attorney Fuchs, five causes of action were alleged: (1) fraudulent concealment;

(2) fraudulent misrepresentations; (3) "negligence"; (4) violation of Corporations Code section 25400 (market manipulation); and (5) violation of Corporations Code section 25401 (misrepresentations in offers to sell securities).

5. *Two Important Developments*

In March 2006, the Morin action settled, for a substantial payment to the Morins. The settlement agreement contained a mutual release of all claims, including any claims arising out of any patents (in existence or pending) for spark plugs. The settlement agreement, however, made no disposition regarding the patent(s), or the technology, owned by Rosenthal.[10]

On June 20, 2006, the Department of Corporations issued a Desist and Refrain Order to Titan and Morin, for violations of the Corporations Code, including section 25401 (which Smith and Graham similarly alleged Titan, Morin and Attorney Fuchs had violated). The order of the Department of Corporations was based on several acts of misconduct, including misrepresentations in the PPM. As relevant to this case,[11] the order stated, "Documents given to investors . . . stated that [Titan] had 'patents

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[10] In other words, Rosenthal retained his patent, while Morin retained his patent pending. It is unclear whether Morin will be able to obtain a patent, given the prior art. (See *KSR International Co. v. Teleflex Inc.* (2007) 550 U.S. 398, 406 [no patent can be issued when the differences between the subject matter sought to be patented and the prior art are such that the subject matter would have been obvious to a person having ordinary skill in the art].) At oral argument on the instant appeal, Attorney Fuchs represented that the release protected Titan. We see no clause in the settlement agreement which explicitly names Titan, nor a clause generally extending its protections to successors and assigns.

[11] The order also noted that SEM did not exist as represented in the PPM and that the Morins had used funds raised from the PPM for personal expenses.

pending.' However, [Titan] did not have issued or pending patents. Morin's previous business venture, Pyromor Systems, involving the spark plug 'patent pending technology' had ended in bankruptcy and Morin lost any rights to the spark plug in 2002."

6. *The Resolution of the Underlying Fraud Action*

Attorney Fuchs moved for summary judgment on the fraud complaint against him. On February 6, 2008, the motion was denied, although summary adjudication was granted in his favor on two causes of action. Specifically, the trial court granted summary adjudication of the "negligence" cause of action, on the basis that Smith and Graham had argued that this was actually a cause of action for negligent misrepresentation, but there can be no cause of action for negligent non-disclosure or concealment. The court granted summary adjudication of one of the two securities fraud causes of action (Corp. Code, § 25400) on the basis that Attorney Fuchs had not sold the securities; the court denied summary adjudication on the other securities fraud cause of action (Corp. Code, § 25401) on the basis that the latter cause of action included sufficient allegations of aiding and abetting. As to the remaining causes of action, the trial court specifically found that Attorney Fuchs failed to establish: (1) that he had no duty to plaintiffs; (2) that plaintiffs did not rely on his representations; or (3) that plaintiffs had not suffered any damages. Triable issues of fact existed as to each issue, which precluded summary judgment on the fraud, fraudulent concealment, and remaining securities fraud causes of action.

The case proceeded toward trial. In August 2008, a global settlement was nearly reached, but ultimately failed. Nonetheless, Smith and Graham proceeded to settle with Larry Kennedy, the other Titan director involved in the case, for $7,500. Moreover, in November 2008, Morin's motion to set aside his default was denied, setting the stage for a default judgment to be entered against him. The case was set to proceed to trial, against Attorney Fuchs only, on January 5, 2009. On December 31, 2008, after the parties had briefed a number of pretrial motions, Smith and Graham voluntarily dismissed the action.[12]

7. *The Instant Malicious Prosecution Action*

On March 3, 2009, Attorney Fuchs brought the instant malicious prosecution action against Smith, Graham, and Attorney Levine, alleging that their institution and continued prosecution of the underlying fraud action against him was malicious.[13]

Smith, Graham and Attorney Levine responded with anti-SLAPP motions. The matter was exhaustively briefed; the record in this appeal exceeds 2500 pages.[14] There

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[12] According to Smith, Graham and Attorney Levine, the action was dismissed because they had achieved their litigation objectives by means of the Kennedy settlement and the soon-to-be-entered default judgment against Morin. They did not believe pursuing a trial against Attorney Fuchs alone would be worth the expense, given their expected recovery from other defendants.

[13] The very first paragraph of Attorney Fuchs's complaint alleges that at all times relevant, Attorney Fuchs "was and is an attorney licensed to practice law in the State of California." This is incorrect; for six months in 2006, while the fraud action was proceeding against him, Attorney Fuchs was suspended from the practice of law in California.

[14] In his reply brief, Attorney Fuchs notes that some of the evidence submitted by Smith, Graham and Attorney Levine in support of their anti-SLAPP motions "had never

is no dispute that the moving parties met their initial burden of establishing the malicious prosecution action was the type of suit to which the anti-SLAPP law applied. The only disputed issue was if Attorney Fuchs established a probability of prevailing on his malicious prosecution action or if, to the contrary, Smith, Graham and Attorney Levine made such a showing impossible by establishing, as a matter of law, that Attorney Fuchs could not prevail. Although the parties litigated each element of the malicious prosecution action, the main battleground was that of probable cause. Specifically, Smith, Graham and Attorney Levine argued that they established probable cause as a matter of law for pursuing the underlying fraud action against Attorney Fuchs. In addition to arguing a triable issue of fact existed as to a lack of probable cause, Attorney Fuchs also moved for the trial court to lift the automatic discovery stay and permit him to conduct limited discovery. The trial court continued the discovery motion to the date of the hearing on the anti-SLAPP motions.

The court[15] granted the anti-SLAPP motions, concluding that probable cause existed for the pursuit of the fraud action as a matter of law. As such, the court concluded that discovery was unnecessary, and denied Attorney Fuchs's motion to lift the stay. Attorney Fuchs filed a timely notice of appeal.

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been previously presented," as though there is something improper about this. As the underlying action against Attorney Fuchs was dismissed on the eve of trial, it would not be surprising that Smith, Graham and Attorney Levine possessed more evidence than they presented in their previous opposition to Attorney Fuchs's motion for summary judgment in the underlying action.

[15] The case was assigned to the same judge who had presided over the underlying fraud action.

CONTENTIONS ON APPEAL

On appeal, Attorney Fuchs argues that the trial court erred in finding probable cause existed as a matter of law. He also argues that the trial court improperly weighed the evidence, rather than simply accepting the evidence he submitted in opposition to the anti-SLAPP motions as true. Finally, Attorney Fuchs argues that the trial court erred in its ruling on the discovery motion. We reject all of Attorney Fuchs's contentions and affirm.

DISCUSSION

1. *Process Governing an Anti-SLAPP Motion*

"Code of Civil Procedure section 425.16 ' "is designed to protect citizens in the exercise of their First Amendment constitutional rights of free speech and petition. It is California's response to the problems created by meritless lawsuits brought to harass those who have exercised these rights." ' [Citation.] A defendant against whom a SLAPP suit has been brought may file a special motion to strike, which will result in the complaint's dismissal unless the plaintiff can establish a probability of prevailing on the claim. (Code Civ. Proc., § 425.16, subd. (b).)

"Adjudication of an anti-SLAPP motion involves a two-part process. First, the moving party bears the burden of establishing a prima facie showing that the plaintiff's cause of action does, in fact, arise from the defendant's free speech or petition activity. Second, if the moving defendant meets that burden then the burden shifts to the plaintiff to establish a probability of prevailing. In order to establish such probability the plaintiff is required to make a prima facie showing of facts which would, if proven at

trial, support a judgment in plaintiff's favor. [Citation.] 'The burden on the plaintiff is similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment.' [Citation.]." (*Marijanovic v. Gray, York & Duffy* (2006) 137 Cal.App.4th 1262, 1269-1270.)

In establishing a probability of prevailing, the plaintiff may not rely on its complaint, even if verified; " 'instead, its proof must be made upon competent admissible evidence. [Citation.] In reviewing the plaintiff's evidence, the court does not weigh it; rather, it simply determines whether the plaintiff has made a prima facie showing of facts necessary to establish its claim at trial.' " (*Paiva v. Nichols* (2009) 168 Cal.App.4th 1007, 1017.) Whether a prima facie case has been established is a question of law. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) In deciding whether a prima facie case has been established, the court considers the pleading and evidentiary submissions of both parties. Although the court does not weigh the credibility or comparative strength of competing evidence, the court should grant the motion if, as a matter of law, the defendant's evidence defeats the plaintiff's attempt to establish evidentiary support for the claim. (*Ibid.*) The court accepts as "true all evidence favorable to the plaintiff and assess[es] the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law." (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700.)

On appeal, we review the trial court's decision de novo, engaging in the same two-step process to determine, as a matter of law, whether the defendant made its threshold showing the action was a SLAPP suit and whether the plaintiff established

a probability of prevailing.[16] (*Marijanovic v. Gray, York & Duffy, supra,* 137 Cal.App.4th at p. 1270.)

Although we independently determine the merits of an anti-SLAPP motion on appeal, we review the trial court's rulings on evidentiary objections in connection with an anti-SLAPP motion for abuse of discretion. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348, fn. 3.) As Attorney Fuchs does not challenge any of the trial court's evidentiary rulings on appeal, we consider those rulings to be controlling in our analysis.

It is not disputed that Smith, Graham and Attorney Levine established their initial burden, as malicious prosecution actions are proper bases for anti-SLAPP motions. (*Marijanovic v. Gray, York & Duffy, supra,* 137 Cal.App.4th at p. 1270.) We therefore consider whether Attorney Fuchs established a probability of prevailing on his malicious prosecution action.

2. *Malicious Prosecution*

" 'In every case, in order to establish a cause of action for malicious prosecution a plaintiff must plead and prove that the prior proceeding, commenced by or at the direction of the malicious prosecution defendant, was: (1) pursued to a legal termination favorable to the plaintiff; (2) brought without probable cause; and (3) initiated with malice.' [Citation.]" (*Marijanovic v. Gray, York & Duffy, supra,*

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[16] On appeal, Attorney Fuchs argues that the trial court erred by relying, in considering the anti-SLAPP motions, on the court's prior tentative opinion on the summary judgment motion in the underlying action, as the tentative opinion was not part of the documents submitted to the court with respect to the anti-SLAPP motion. As our review is de novo, the trial court's rationale for its ruling is not relevant.

137 Cal.App.4th at pp. 1270-1271.) In this case, we are concerned with the second element.

"A plaintiff has probable cause to bring a civil suit if his claim is legally tenable. This question is addressed objectively, without regard to the mental state of plaintiff or his attorney. [Citation.] The *court* determines as a question of law whether there was probable cause to bring the maliciously prosecuted suit. [Citation.] Probable cause is present *unless any reasonable attorney would agree that the action is totally and completely without merit*. [Citation.] This permissive standard for bringing suits, and corresponding high threshold for malicious prosecution claims, assures that litigants with potentially valid claims won't be deterred by threat of liability for malicious prosecution. [Citation.] [¶] Probable cause may be present even where a suit lacks merit. Favorable termination of the suit often establishes lack of merit, yet the plaintiff in a malicious prosecution action must *separately* show lack of probable cause. Reasonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which *all* reasonable lawyers agree totally lack merit – that is, those which lack probable cause – are the least meritorious of all meritless suits. Only this subgroup of meritless suits present no probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382; italics in original.)

Probable cause encompasses both legal tenability and factual tenability. (*Arcaro v. Silva & Silva Enterprises Corp.* (1999) 77 Cal.App.4th 152, 156.) As to legal tenability, "[t]he [probable cause] standard is . . . designed to accommodate the

requirement that the court 'properly take into account the evolutionary potential of legal principles.' " (*Paiva v. Nichols, supra,* 168 Cal.App.4th at p. 1019.) "[A]n action is 'tenable' from the legal perspective if it is supported by existing authority or the reasonable extension of that authority."[17] (*Arcaro v. Silva & Silva Enterprises Corp., supra,* 77 Cal.App.4th at p. 156.)

As to factual tenability, a denial of a defendant's summary judgment motion in the underlying case provides persuasive evidence of probable cause. This is so because a denial of a summary judgment motion is a finding that there are genuine issues of material fact. (*Roberts v. Sentry Life Insurance, supra,* 76 Cal.App.4th at p. 383.) This conclusion necessarily implies that the trial court found at least some merit to the claim. "The claimant may win, if certain material facts are decided favorably. This finding (unless disregarded) compels conclusion that there is probable cause, because probable cause is lacking only in the *total absence* of merit." (*Ibid.*) Thus "denial of defendant's summary judgment in an earlier case normally establishes there was probable cause to sue, thus barring a later malicious prosecution suit." (*Id.* at p. 384.) The presumption is not conclusive "because there may be situations where denial of summary judgment should not irrefutably establish probable cause. For example, if denial of summary judgment was induced by materially false facts submitted in opposition, equating denial

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[17] In his reply brief on appeal, Attorney Fuchs argues, "No objective lawyer could have thought that he or she had probable cause to assert, and to continue to prosecute, a cause of action that does not exist as a matter of law." Attorney Fuchs cites no authority for this proposition. Clearly, there is none. A reasonable attorney can have probable cause to prosecute a cause of action that does not exist if it is supported by a reasonable extension of existing authority.

with probable cause might be wrong. Summary judgment might have been granted but for the false evidence." (*Ibid.*)

As a suit for malicious prosecution lies for bringing an action charging multiple grounds of liability, when some, but not all, of those grounds were asserted with malice and without probable cause, (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 671) we consider whether probable cause existed to bring each cause of action pleaded in the underlying fraud complaint. Moreover, an attorney may be liable for malicious prosecution if the action was properly commenced, but the attorney continued to prosecute it after learning that it was not supported by probable cause. (*Zamos v. Stroud, supra,* 32 Cal.4th at p. 960.) Thus, while we consider the existence of probable cause to commence the action with respect to each cause of action, we also consider whether probable cause was defeated at some point during the continued prosecution of the underlying fraud action.

3. *Causes of Action for Fraudulent Concealment and Fraudulent Misrepresentation*

There is no dispute that fraudulent concealment and fraudulent misrepresentation are legally tenable theories of relief. The issue with respect to probable cause is whether those causes of action were factually tenable when pleaded in the underlying fraud action.

As summary adjudication of the issues was denied with respect to these causes of action in the underlying case, a presumption of probable cause arises. Attorney Fuchs argues that the presumption should not apply in this case, on the basis that the ruling on

summary adjudication was obtained by fraud. Attorney Fuchs argues that the evidence on which Smith and Graham relied to establish a triable issue of material fact as to the element of reliance – specifically their declarations that they relied on the PPM when deciding to invest – was perjured testimony.

As to Smith, Attorney Fuchs relies on an excerpt from her September 18, 2007 deposition, in the underlying action, in which she testified that she did not read "this document" at any time before investing in Titan. Attorney Fuchs argues that this deposition testimony referred to the PPM, thus establishing that Smith could not have relied on the PPM when she decided to invest. Yet, while this deposition excerpt was properly before the trial court in connection with the anti-SLAPP motion, Attorney Fuchs's characterization of that excerpt – specifically, that it related to the PPM – was not. The court sustained objections to that part of Attorney Fuchs's declaration which so characterized the testimony, on the bases of lack of foundation, argumentative, irrelevant, and improper opinion or legal conclusion based on speculation and conjecture.[18] Thus, Attorney Fuchs is left with the argument that Smith's evidence that

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[18] In Attorney Fuchs's declaration, he stated, "The truth is that in September of 2007, Smith testified in her deposition, despite [Attorney] Levine's best efforts to coach her or testify for her, that she never 'thoroughly reviewed' the PPM, as she now claims, but first 'looked it over' a year after she and Graham invested in Titan." As discussed above, the objections to this language were sustained. Unfortunately, this did not stop Attorney Fuchs from arguing, in his reply brief on appeal, "Smith testified in her deposition, despite [Attorney] Levine's best efforts to coach her or testify for her, that she never 'thoroughly reviewed' the PPM, but first 'looked it over' a year after she and Graham invested in Titan." Attorney Fuchs cited to the deposition testimony itself for the proposition, ignoring the fact that there is no admissible evidence that the deposition testimony referred to the PPM, nor that Attorney Levine attempted to coach Smith or testify for her.

she relied on the PPM was perjured because she testified, at deposition, that there is some unidentified "document" that she did not look over before investing in Titan. As this evidence does not in any way contradict Smith's evidence that she relied on the PPM, it does not establish that the summary judgment was obtained by fraud. (See *Roberts v. Sentry Life Insurance*, *supra*, 76 Cal.App.4th at p. 385.) Moreover, there are two additional reasons why Attorney Fuchs's argument fails to establish that the summary judgment was obtained by fraud. First, the investment in Titan was made entirely by Graham, who then made a gift of one unit to Smith; thus, Smith's reliance or lack thereof is irrelevant. Second, when considering the summary judgment motion in the underlying action, the court sustained an objection to Smith's declaration in its entirety, as it was improperly certified, and thus *did not consider it* in ruling on the summary judgment motion. Instead, the trial court denied summary adjudication on these causes of action because Attorney Fuchs failed to introduce *any* evidence that there had been no reliance. Summary adjudication was not denied based on any evidence (fraudulent or otherwise) submitted by Smith and Graham, but a complete failure of proof on the part of Attorney Fuchs.[19]

As to Graham, Attorney Fuchs's argument is even less persuasive. Here, he relies on deposition excerpts indicating that Graham was solicited to invest in Titan by a friend of his named Jim Hogan. At Graham's September 18, 2007 deposition, Graham testified that Hogan heavily promoted Titan, through fifteen or twenty

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[19] In this respect we note that the deposition in question predated the trial court's ruling on the summary judgment motion. The record does not indicate whether Attorney Fuchs relied on the very same excerpt on which he relies now.

conversations. Attorney Fuchs argues that this is evidence that Graham's declaration that he relied on the PPM was perjured, as the deposition indicates that Graham invested in reliance on Hogan, not on the PPM. The argument is meritless. That Graham relied on Hogan does not preclude him from also having relied on the PPM; thus, there is no contradiction. Additionally, as with Smith, the trial court did not rely on Graham's (improperly certified) declaration in denying summary judgment, but instead relied only on Attorney Fuchs's failure of proof. Thus, Attorney Fuchs has failed to establish that the summary adjudication denial was obtained by fraud, and the presumption of probable cause applies.

Moreover, independent of the trial court's rulings on summary adjudication, we conclude that Smith, Graham and Attorney Levine had probable cause to sue for fraud as a matter of law. As to the element of reliance, Attorney Fuchs again relies on the deposition excerpts referred to above, arguing that they are sufficient evidence of a lack of probable cause, and that this court must not weigh this evidence against the (now properly-certified) declarations of Smith and Graham to the contrary. We disagree. In opposition to an anti-SLAPP motion, in order to establish a probability of prevailing, the plaintiff must make a prima facie showing of facts which would, if proven at trial, support a judgment in his favor. Attorney Fuchs's showing does not meet this standard. Evidence that (1) Smith did not rely on an unidentified document prior to investing in Titan, and (2) Graham relied on Hogan prior to investing in Titan, is simply insufficient as a matter of law to establish that Smith and Graham did not rely on the PPM prior to

investing in Titan, and therefore lacked probable cause to sue for fraud with respect to that document.

Reliance is not the only element challenged by Attorney Fuchs. He also argues that Smith and Graham lacked probable cause to bring the fraud causes of action because they knew the investment in Titan was highly speculative, so they cannot attribute any of their financial losses to misstatements in the PPM. But Smith and Graham proceeded on the theory that they would not have invested in Titan *at all* had they known that Titan's only asset – the spark plug technology claimed by Morin – was, in fact, in litigation. This theory would support an award of damages regardless of the speculative nature of the investment.

Additionally, Attorney Fuchs argues that any claim that the Morin litigation might have affected the Titan technology dissipated after the Morin litigation was resolved by settlement. Again, Attorney Fuchs misperceives the nature of Smith and Graham's complaint. Smith and Graham were not seeking damages caused by any loss in the value of their investment in Titan that may have resulted from the resolution of the non-disclosed litigation; they were seeking damages caused by the fact that they would not have invested in Titan at all were it not for the misrepresentations about ongoing litigation in the PPM. Moreover, there is no evidence that the Morin litigation did not harm Titan by delaying Titan's ability to timely market its spark plug.

Finally, we note that, throughout the proceedings, Attorney Fuchs takes the position that the "actual issue" in the underlying fraud action was whether the Titan spark plug technology was either identical or substantially similar to the technology at

issue in the Morin litigation; apparently on the theory that if the technologies were *not* substantially similar, there was no basis to require disclosure of the Morin litigation in the Titan PPM. To the extent Attorney Fuchs is correct with this characterization of the issue, we nonetheless conclude that probable cause existed to bring the underlying action as a matter of law. Smith, Graham and Attorney Levine possessed significant evidence that the technologies were substantially similar, consisting not only of the testimony of Malm and Rosenthal, but statements of Morin and Attorney Fuchs at Morin's deposition in the Morin litigation. While Attorney Fuchs points to evidence that the technology was not the same, none of this evidence can undermine the conclusion that Smith, Graham and Attorney Levine possessed substantial evidence of similarity, sufficient to establish probable cause.[20]

4. *Cause of Action for "Negligence"*

Summary adjudication was granted with respect to the "negligence" cause of action in the underlying litigation. This ruling was not based on any factual determination, but the trial court's conclusion that Smith, Graham and Attorney Levine

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[20] Attorney Fuchs relies on a letter he sent Attorney Levine shortly after the complaint in the underlying action was filed, stating that Attorney Levine and his clients "have been sucker-punched by Bert Rosenthal" and impugning Rosenthal's credibility. This letter could not possibly defeat probable cause. " 'A litigant or attorney who possesses competent evidence to substantiate a legally cognizable claim for relief does not act tortiously by bringing the claim, even if also aware of evidence that will weigh against the claim. Plaintiffs and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them.' " (*Marijanovic v. Gray, York & Duffy, supra,* 137 Cal.App.4th at p. 1271.) "Indeed, it could well constitute malpractice for an attorney to drop a lawsuit, for which supporting evidence existed, merely because opposing counsel asserted the action was baseless." (*Id.* at p. 1272, fn. 5.)

were treating the cause of action as one for negligent misrepresentation, and its determination that there is no cause of action for negligent misrepresentation based on non-disclosure or concealment. Here, then, the probable cause issue is one of legal tenability.

We consider the legal tenability of this cause of action de novo.[21] While there is authority for the proposition that "a positive assertion is required" for negligent misrepresentation liability and that "an omission or an implied assertion or representation is not sufficient" (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243), other authority suggests the distinction is not so clear cut. "[W]hen the defendant purports to convey the 'whole truth' about a subject, ' "misleading half-truths" ' about the subject may constitute positive assertions for the purpose of negligent misrepresentation. Thus, . . . the [California Supreme C]ourt held that letters of recommendation for an instructor that extolled his rapport with students and urged his employment but omitted reference to complaints about his improper contact with female students amounted to 'false and misleading' representations. [Citation.]" (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 854.)

This authority provides a legal basis for the negligent misrepresentation cause of action in the underlying fraud action. That Titan's directors represented in the PPM that

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[21] Attorney Fuchs argues that the trial court below, and this court on appeal, are bound by the trial court's determination in the prior action that there is no legal basis for a negligent misrepresentation cause of action based on non-disclosure or concealment. Attorney Fuchs argues that the trial court's determination "is conclusive here." He cites to no legal authority for this proposition. Clearly, there is none.

the "Company is not currently involved in any litigation or administrative proceeding believed to be material to the development of the Company's business objectives or the Offering," while omitting reference to the then-pending Morin litigation appears to be precisely the type of "misleading half-truth" that can constitute a positive assertion for the purposes of negligent misrepresentation. As such, we cannot conclude that no reasonable attorney would have thought a negligent misrepresentation cause of action had merit, and probable cause therefore existed as a matter of law.

5. *The Securities Fraud Causes of Action*

Although summary adjudication was granted with respect to one securities fraud cause of action and denied with respect to the other, we discuss them together as the issue of probable cause depends on a solid understanding of the differences between the two causes of action. Much of the confusion arises because the statutes defining the prohibited activity and the statutes providing private remedies for the prohibited conduct are not consecutive.

Corporations Code section 25400[22] "prohibits false and misleading statements designed to manipulate the securities markets." (*California Amplifier, Inc. v. RLI Ins.*

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[22] In this case, we are concerned with Corporations Code section 25400, subdivision (d) which declares it unlawful "for any person, directly or indirectly," if the person is "selling or offering for sale or purchasing or offering to purchase the security, to make, for the purpose of inducing the purchase or sale of such security by others, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or which omitted to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and which he knew or had reasonable ground to believe was so false or misleading."

Co. (2001) 94 Cal.App.4th 102, 108.) We will refer to this conduct as "market manipulation." Corporations Code section 25401[23] "is a broader statute that prohibits misrepresentations in connection with the purchase or sale of securities in general." (*California Amplifier, Inc. v. RLI Ins. Co., supra,* 94 Cal.App.4th at pp. 108-109.) We will refer to this conduct as "misrepresentation in sales." Each of these statutes is penal in nature and, in and of itself, provides no civil remedy for its violation. (*Id*. at p. 109.) Instead, each statute has a corresponding private enforcement statute which establishes a private remedy for damages.

First, we consider market manipulation. Corporations Code section 25500[24] creates the private remedy for market manipulation. This statute "extends liability to all persons affected by market manipulation without requiring reliance or privity." (*California Amplifier, Inc. v. RLI Ins. Co., supra* 94 Cal.App.4th at p. 109.) Thus, for example, former owners of stock in a corporation could pursue a cause of action for market manipulation against a hedge fund that conspired with an investment reporting

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[23] Corporations Code section 25401 provides, "It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."

[24] Corporations Code section 25500 provides, "Any person who willfully participates in any act or transaction in violation of Section 25400 shall be liable to any other person who purchases or sells any security at a price which was affected by such act or transaction for the damages sustained by the latter as a result of such act or transaction. Such damages shall be the difference between the price at which such other person purchased or sold securities and the market value which such securities would have had at the time of his purchase or sale in the absence of such act or transaction, plus interest at the legal rate."

company to have the company issue false negative reports on the corporation in order to benefit the hedge fund, which was shorting the corporation's stock. (*Overstock.com, Inc. v. Gradient Analytics, Inc.*, *supra,* 151 Cal.App.4th at p. 717.)

Second, we consider misrepresentation in sales. Corporations Code section 25501[25] creates the private remedy for misrepresentation in sales. This statute, by its terms, provides that the only plaintiffs who can recover are those who purchased (or sold) the security from (or to) the person making the misrepresentation. In other words, while privity is not required to recover for market manipulation, it is required to recover for misrepresentation in sales. (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC, supra,* 158 Cal.App.4th at p. 253.) The privity requirement is tempered, however, by Corporations Code section 25504,[26] which extends liability to certain

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[25] Corporations Code section 25501 provides, "Any person who violates Section 25401 shall be liable to the person who purchases a security from him or sells a security to him, who may sue either for rescission or for damages (if the plaintiff or the defendant, as the case may be, no longer owns the security), unless the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know (or if he had exercised reasonable care would not have known) of the untruth or omission. Upon rescission, a purchaser may recover the consideration paid for the security, plus interest at the legal rate, less the amount of any income received on the security, upon tender of the security. . . . Damages recoverable under this section by a purchaser shall be an amount equal to the difference between (a) the price at which the security was bought plus interest at the legal rate from the date of purchase and (b) the value of the security at the time it was disposed of by the plaintiff plus the amount of any income received on the security by the plaintiff. . . . Any tender specified in this section may be made at any time before entry of judgment."

[26] Corporations Code section 25504 provides, "Every person who directly or indirectly controls a person liable under Section 25501 . . . , every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions, every employee of

individuals who materially aid a transaction which constitutes a misrepresentation in sales. (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC, supra,* 158 Cal.App.4th at p. 233, 256.) Moreover, any person who "materially assists" a misrepresentation in sales "with [the] intent to deceive or defraud, is jointly and severally liable with any other person liable . . . for such violation." (Corp. Code, § 25504.1)

We now consider the facts of this case. Preliminarily, there is evidence, if not conclusive evidence, that Titan was the offeror and seller of securities to Smith and Graham. The PPM repeatedly identified Titan as the offeror, and indicated that, if an individual wished to subscribe, the purchaser should make its check payable to Titan. Finally, the attached "Subscription Agreement and Confidential Purchaser Questionnaire" provided that the decision whether to accept or reject a subscription was Titan's, and that the acceptance was to be signed by Titan's President on its behalf.

With this fact in mind, we now turn to the causes of action alleged.

a. *Smith and Graham Alleged a Cause of Action for Market Manipulation*

The market manipulation cause of action does not require privity between the plaintiff and defendant; *any* purchaser of stock harmed by a defendant's market manipulation may recover. However, the question remains whether Attorney Fuchs's

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a person so liable who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, are also liable jointly and severally with and to the same extent as such person, unless the other person who is so liable had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist."

conduct – his false statement in his response to the questionnaire, knowing that the information would be included in the PPM – constitutes an act of market manipulation under the terms of Corporations Code section 25400. The question is a close one.[27] Subdivision (d) of Corporations Code section 25400, under which Smith and Graham sought to proceed,[28] imposes liability for market manipulation on "a broker-dealer or other person selling or offering for sale or purchasing or offering to purchase the security" who makes a false statement (or misleading omission) for the purpose of inducing the purchase or sale of such security by others. Smith, Graham and Attorney Levine suggest that Attorney Fuchs falls within the terms of this language as he was a "purchaser" of Titan stock at the time he contributed to the PPM. There is some evidence supportive of this contention. When Attorney Fuchs filled out the questionnaire, he indicated that he believed he would receive 10,000 shares of preferred stock; instead, at the time the PPM was issued, Attorney Fuchs was credited with owning 600,000 shares. The discrepancy suggests Attorney Fuchs obtained his stock at or near the time the PPM was created. Moreover, Attorney Fuchs indicated in an

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[27] The trial court reasoned that Attorney Fuchs could conceivably be liable under Corporations Code section 25403, subdivision (b) which indicates that anyone who knowingly provides substantial assistance to, among other things, acts of market manipulation is similarly in violation. But Corporations Code section 25403 is a penal statute defining misconduct, not a statute providing for civil liability. In fact, case law holds that no private right of action exists under Corporations Code section 25403. (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC, supra,* 158 Cal.App.4th at p. 233.)

[28] The trial court's order on the summary judgment motion refers to a different subdivision of Corporations Code section 25400, although its analysis would be equally applicable to the more-appropriate subdivision (d).

interrogatory answer that he was given these shares "in return for [his] agreement to become a director of Titan and/or for future legal services." This evidence supports the conclusion that Attorney Fuchs was a purchaser[29] of Titan stock at the time he engaged in conduct which constituted market manipulation, which would therefore render him liable.[30] While this argument might not carry the day, it is not so meritless that no reasonable attorney would pursue it. Smith, Graham and Attorney Levine therefore had probable cause to pursue Attorney Fuchs for market manipulation, even though summary adjudication had been granted on this cause of action.

b. *Smith and Graham Alleged a Cause of Action for Misrepresentation in Sales*

Attorney Fuchs's potential liability to Smith and Graham for misrepresentation in sales is much more evident. Titan offered, and sold, securities to Smith and Graham by means of allegedly untrue statements in the PPM. If the statements were, in fact, untrue, this is a violation of misrepresentation in sales by Titan. However, liability for misrepresentation in sales also extends to those who materially assist a violation with

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[29] A sale includes every exchange of a security for value. (Corp. Code, § 25017, subd. (a).)

[30] In his brief on appeal, Attorney Fuchs argues that the trial court, in ruling on the anti-SLAPP motions, " 'completely ignored' language in his declaration in which he stated that the trial courts 'correctly held [on summary adjudication] that I could not be liable to Smith and Graham for [market manipulation] because the undisputed evidence established that I was neither a seller nor a promoter of the Titan shares, and I did not directly sell or offer the Titan securities to Smith and Graham.' " While this language does not defeat the argument that Attorney Fuchs was liable for market manipulation as a purchaser, there is a more serious problem. The trial court did not "completely ignore[]" the language; instead, it sustained an objection to it. Attorney Fuchs's continued reliance on evidence which the trial court ruled inadmissible, without ever addressing the trial court's evidentiary rulings, is improper.

the intent to deceive or defraud. The evidence that Attorney Fuchs was, in fact, *knowingly responsible* for the false statements in the Titan PPM establishes a case for liability for material assistance. Thus, probable cause existed to pursue Attorney Fuchs for misrepresentation in sales.

6. *Continued Pursuit of Attorney Fuchs*

Attorney Fuchs argues that even if probable cause initially existed to bring the underlying fraud action against him, that probable cause disappeared at some point, rendering the continued pursuit of the action malicious prosecution. With one exception, Attorney Fuchs fails to identify any particular piece of evidence or change in the law which would have defeated probable cause.[31] (Compare *Paiva v. Nichols*, *supra*, 168 Cal.App.4th at p. 1029 [malicious prosecution plaintiff identified two facts and a case which he argued represented a change in the evidence and law which undermined probable cause].) Instead, he simply argues that at some unidentified point, Smith, Graham and Attorney Levine should have realized their claims were baseless. We need not respond to such a broad, unsupported argument.

7. *Denial of Discovery was Not an Abuse of Discretion*

The filing of an anti-SLAPP motion stays discovery. (Code Civ. Proc., § 425.16, subd. (g). The trial court, however, on good cause shown, may order that specified

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[31] Attorney Fuchs suggests that, when he prevailed on summary adjudication on two causes of action, Smith, Graham and Attorney Levine should have re-examined their evidence and dismissed the remaining causes of action. The argument is unpersuasive. The trial court's simultaneous denial of summary adjudication with respect to the remaining causes of action constitutes presumptive evidence that probable cause existed to pursue them.

discovery be conducted. (*Ibid.*) We review a trial court's ruling on a motion to lift the discovery stay for an abuse of discretion. (*The Garment Workers Center v. Superior Court* (2004) 117 Cal.App.4th 1156, 1159.)

"Surely the fact evidence necessary to establish the plaintiff's prima facie case is in the hands of the defendant or a third party goes a long way toward showing good cause for discovery. But it is not the only factor. The trial court should consider whether the information the plaintiff seeks to obtain through formal discovery proceedings is readily available from other sources or can be obtained through informal discovery. The court should also consider the plaintiff's need for discovery in the context of the issues raised in the SLAPP motion. If, for example, the defendant contends the plaintiff cannot establish a probability of success on the merits because its complaint is legally deficient, no amount of discovery will cure that defect." (*The Garment Workers Center v. Superior Court, supra,* 117 Cal.App.4th at p. 1162.) Moreover, if the motion can be resolved without reaching an issue on which discovery is necessary, the trial court should consider resolving the other issues before permitting what may otherwise turn out to be unnecessary, expensive and burdensome discovery. (*Ibid.*)

In this case, the trial court did not abuse its discretion by refusing to permit discovery. While issues of malice and favorable termination might have turned on the mindset of Smith, Graham and Attorney Levine, the ultimately dispositive issue of probable cause largely did not. Several of the issues of probable cause in this case were issues of legal tenability, which were independent of discovery. Those few issues

relating to factual tenability were similarly resolved as a matter of law based on evidence which Smith, Graham and Attorney Levine indisputably possessed. Attorney Fuchs argues that the issue of probable cause turns on what Smith and Graham knew and when they knew it. We disagree. Attorney Fuchs indisputably signed a questionnaire indicating that Titan was not involved in any litigation. Smith, Graham and Attorney Levine possessed evidence that this was false, or, at least, a half-truth. They possessed evidence that the Morin litigation implicated Titan's technology, and that the litigation was knowingly concealed by Attorney Fuchs. They possessed evidence that they relied on the statement in the PPM which conveyed Attorney Fuchs's false statement to them, and all other prospective purchasers.[32] Some months after they brought their case, the Department of Corporations issued a desist and refrain order against Titan, based, in part, on the same misconduct, providing further support for their pursuit of the underlying action. No amount of discovery from Smith, Graham, or Attorney Levine could undermine this evidence of probable cause.

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[32] To the extent Attorney Fuchs sought to further depose Smith and Graham in the hopes of obtaining an admission that they had not relied on the PPM prior to investing, despite their declarations to the contrary, the court did not abuse its discretion in denying such a fishing expedition.

DISPOSITION

The order granting the anti-SLAPP motions is affirmed. Smith, Graham and Attorney Levine shall recover their costs on appeal. The matter is remanded to the trial court to consider any motions by Smith, Graham and Attorney Levine for an award of attorney's fees incurred on appeal. (Code Civ. Proc., § 425.16, subd. (c)(1).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.